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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 182

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
Petitioner

v.

JOSEPH W. BUCHANAN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Massachusetts Protective Association, a corporation, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on March 24, 1955.

OPINIONS BELOW

The trial court filed a written opinion (R. 27-30), as did the Municipal Court of Appeals for the District of Columbia. (R. 46). The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported, but is set forth in the appendix filed herewith. (App. 2a-7a)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March 10, 1955. A petition, seasonably filed, for rehearing in banc, was denied on March 24, 1955.

The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 1254 (1), 1952 ed.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

On June 16, 1953, respondent filed a civil action in the Municipal Court for the District of Columbia to recover full indemnities for total disability resulting from disease which began before and continued after he reached age sixty. Petitioner defended on policy provisions which expressly reduced indemnities 50% after the insured reached that age. Since it had paid on this basis, it denied further liability. The trial court found in favor of the petitioner, and entered judgment accordingly. (App. 11a-15a). Respondent appealed to the Municipal Court of Appeals for the District of Columbia, which affirmed the trial court by a unanimous opinion. (App. 8a-10a). On application of respondent the United States Court of Appeals for the District of Columbia Circuit allowed an appeal.

The case was duly heard, and on March 10, 1955, the Court reversed by a two to one decision, the dissenting judge holding that there should be an affirmance in accordance with the opinion of the Municipal Court of Appeals.

In view of the widespread effect of the decision by only a division of the Court (three judges) a petition for rehearing in banc was filed within the time allowed. This petition was denied on March 24, 1955, without any assignment as to the reasons for denial. (App. 1a). The judgment of reversal is sought to be reviewed by this petition for writ of certiorari.

ADMITTED FACTS

On March 4, 1924, the petitioner issued two policies of accident and health insurance to respondent, one known as the "Perfection" Policy (R. 38), and the other known as the "Daily Benefit" policy. (R. 39). The two policies were almost identical, differing only as to the extent of coverage and rate of indemnity.

The Perfection policy provides indemnity for loss of life, limb, sight and time by accidental means, or of time by disease, the principal sum for accidental death and for losses enumerated in Clause E, being $5,000.00. For total disability resulting from accident or disease, Clause A provides for a weekly indemnity of $50.00 *"as hereinafter limited"*. Clause I provides as follows:

> "The weekly indemnity provided for in this policy for disability caused by accidental injury shall be paid so long as the insured lives and suffers continuous total disability from the date of the accident, otherwise weekly indemnities for disabilities caused by accident or disease shall not collectively cover periods exceeding sixty (60) weeks.

> Thereafter the insured may at his option continue the policy for its death and dismemberment benefits at one-third the then premium, or cancel the same and receive from the Association the premium paid for any unexpired period hereunder * * *."

Clause N provides:

> "The term of this policy commences upon the date hereof and until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent."

The Daily Benefit policy provides indemnity for loss of time by accident or disease. Clause A provides that for total disability, the indemnity is $7.00 per day, *"as hereinafter limited"*. Clause E provides:

> "The indemnities provided by this policy, collectively, shall not cover periods of disability exceeding 365 days in the aggregate * * *."

Clause I provides:

> "The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday unless the policy previously expires under provision E above. After the insured passes his sixtieth birthday, all indemnities payable under this policy will automatically be reduced Fifty Per Cent."

There was attached to each policy what is designated "Continuous Disability Rider.". The rider in the Perfection policy provides, in part, as follows:

> "If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks de-

scribed in Clause I of the attached policy, the weekly indemnity provided by said policy shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled * * *."

The rider attached to the Daily Benefit policy reads, in part, as follows:

> "If total disability arising thereunder prior to the insured's sixtieth birthday continues beyond the 365 days described in Clause E of the attached policy, the weekly indemnity provided by said policy shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled by accident, or similarly disabled and necessarily confined within the house by disease, in either case under the regular care of a licensed physician. * * *."

Respondent was 32 years old when these policies were issued. If he had become totally disabled by disease after the effective date of the Perfection Policy, the rider permitted him to use up the aggregate of sixty weeks at the full rate of $50.00 until his sixtieth birthday. If he lived thereafter, the benefits would continue under Clause "N" at the half rate following his sixtieth birthday, but as long as he was continuously totally disabled, regardless of how long he lived.

Under the Daily Benefit Policy, he was entitled to $7.00 per day pursuant to Clause "A", for 365 days in the aggregate as limited by Clause "E", for period commencing with the date of the policy and running until his 70th birthday, unless prior thereto the policy expired under Clause "E" as provided in Clause "I". The latter clause also provided that after he passed his sixtieth birthday all indemnities would be reduced 50%.

The rider eliminated the restriction of 365 days which would otherwise obtain, and provided that if total disability arose prior to his sixtieth birthday the weekly indemnity should continue as long as he thereafter lived and was continuously totally disabled.

These policies have been in force for 30 years. Respondent has made thirty-three (33) claims for indemnity, and on account thereof he was paid $4,987.72. For his present disability, which was not disputed, he was paid full indemnity until November 21, 1952, at which time he reached age sixty. Thereafter petitioner reduced the payments fifty percent in accordance with the express language of the policies. Thereupon, respondent claimed that this interpretation was erroneous, and that indemnities should only be reduced if the disability commenced after he reached age sixty. The petitioner took the position that the policies meant exactly what they state, that is, indemnities will be reduced fifty percent after age sixty, nothing more, nothing less. Five judges agreed, i.e., the trial judge, all three judges of the Municipal Court of Appeals, and one judge of the United States Court of Appeals for the District of Columbia Circuit.

REASON FOR GRANTING THE WRIT

I. The decision below fails to give proper effect to applicable decisions of this Court, to applicable decisions in other circuits, and to prior decisions of the District of Columbia Circuit. It is in conflict therewith on a fundamental principle of law which is of general importance, namely, that insurance contracts, like other contracts, should be construed according to the sense and meaning of the terms used by the parties. Ambiguities are not to be sought or reached for. Words

used are to be construed in the ordinary and popular sense.

II. The decision below disregards the plain and unambiguous terms of the policies and creates a new contract for the parties in violation of Section 10, of Article 1, of the Constitution of the United States.

III. The decision below extends liability of the insurer far beyond the limits fixed by its contracts, imposes a financial burden for which no compensation is received, and, in the last analysis, adversely affects the best interests of the public.

POINT I

The United States Court of Appeals for the District of Columbia Circuit Has Not Given Effect to Applicable Decisions of This Court, and is in Conflict Therewith and With Decisions of Other Circuits and Its Own Prior Decisions

In reversing both lower courts, the United States Court of Appeals departed from a universal rule of construction which always has been recognized as sound by this Court, and others, both Federal and local, throughout the country.

The trial court and the Municipal Court of Appeals agreed that the language of these policies is clear and unambiguous. In reversing, the United States Court of Appeals concluded that Clause "N" in the Perfection Policy is applicable only to disabilities *commencing* after age 60. This, in effect, constituted a rewriting of the policy, although there is no evidence that it failed to state accurately and completely the intention of the parties at the time it was issued. The holding conflicts with the following decisions of this Court:

Aetna Insurance Co. v. *Boon,* 95 U. S. 117, 24 L. ed. 395.

Imperial Fire Ins. Co. v. *County of Coos,* 151 U. S. 452, 38 L. ed. 231.
Liverpool, etc. Ins. Co. v. *Kearney,* 180 U. S. 132, 45 L. ed. 460.
Bergholm v. *Peoria S. Ins. Co.,* 284 U. S. 489, 76 L. ed. 460.

In *Imperial Fire Ins. Co.* v. *Coos,* supra, this Court said:

> "It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of this policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. *The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.*"

In *Thompson* v. *Phenix Ins. Co. of Brooklyn,* 136 U. S. 287 [34:408], this Court indicated that when an insurance contract is ambiguous, or requires interpretation, or is fairly susceptible to two different constructions so that reasonably intelligent men on reading the contract could honestly differ as to its meaning, that construction will be adopted which is most favorable to the insured.

> "But the rule is equally well settled that the contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

This rule of construction has been universally accepted. We invite the court's attention to decisions in

other circuits which illustrate its application, and demonstrate the error of the decision sought to be reviewed.

Neel v. *Mutual Life Ins. Co. of N. Y.*, 131 F. 2d 159 (N. Y.).
Harbor Towing Co. v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (Md.).
Globe Indemnity Co. v. *Liberty Mut. Ins. Co.*, 138 F. 2d. 180 (Pa.).

The Court below failed to follow the rule laid down, as recently as 1952, in *Union Tr. Co.* v. *Continental Cas. Co.*, 90 U. S. App. D. C. 216, 194 F. 2d 901. Its prior decision is not referred to in the majority opinion, and apparently was not intended to be repealed. We submit, however, that the ruling in the case at bar is contrary to and inconsistent with the case cited.

POINT II

The United States Court of Appeals Has in Effect Made a New Contract for the Parties in Violation of Section 10, Article 1, of the Constitution

The Court of Appeals has disregarded the plain and unambiguous terms of a valid contract, and this action has resulted in the making of an entirely new and different contract which is a violation of Section 10, of Article 1, of the Constitution of the United States.

It is an accepted fact that insurance contracts are effected with a quasi public interest, and because of that, the industry has long been subject to governmental supervision. The ordinary insurance contract must meet the requirements of state statutes, and since the terms of the insurance contracts are so regulated, so must the decisions of courts fit into an accepted pattern. The insurance underwriter is dependent upon a stable

and well defined orbit in which he can operate. Otherwise, the entire industry is without a guide in a field of tremendous risks.

The rules for construing ordinary contracts have long been held applicable to insurance contracts, provided the terms are free of ambiguity. The court below has disregarded this well settled rule of construction. Instead, it has rewritten the contracts, making them conform to its thinking, without a shred of evidence that its interpretation conforms to the actual or presumed intention of the parties, to the damage of the petitioner. This constitutes an impairment of the contract obligation and violates Section 10, of Article 1 of the Federal Constitution.

This court has held that a valid contract may be impaired by wrongful construction. *J. W. Perry Co.* v. *Norfolk,* 220 U. S. 472, 55 L. ed. 548. Where a contract is valid at the time it is made, under state law as then expounded, its validity or obligation cannot be impaired by subsequent judicial decision giving a different exposition of the law. *McLure* v. *Melton,* 133 U. S. 380, 33 L. ed. 660. In a later decision this Court laid down the rule that when there is a diversity of state decisions the first in time may constitute the obligation of contracts and the measure of rights under it. *Muhlker* v. *New York, etc. R. Co.,* 197 U. S. 570, 49 L. ed. 872.

POINT III

Decision Below Adversely Affects Public Interest

It is palpably clear that the decision below extends liability of the insurer far beyond the limits fixed by its contracts. Therefore, it imposes a financial burden for which no compensation is received. In the last analysis this adversely affects the best interests of the

public. This Court will take judicial notice of the vast number of contracts by which individuals seek protection against disability resulting from accident or disease. Rates have been established so that the insurer is provided the means with which to meet its obligations. Without adequate premiums this could never be assured. The ratio between premiums and losses must be estimated in advance. If the estimate is required to run the hazard of judicial decisions which disregard the contract provisions, no insurer is safe. If, as in this case, the company is required to pay full indemnity when it contracted to pay only one-half, the relation between premium and obligation to indemnify is distorted. In the place of an orderly program, within which the company can safely operate, there is substituted confusion and chaos. The company's ability to pay is seriously undermined. The public could and undoubtedly would be adversely affected. This is an element which the Court of Appeals apparently ignored or failed to evaluate.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,086, *Joseph W. Buchanan, Appellant* v. *The Massachusetts Protective Association, a body corporate, Appellee,* and that the judgment therein of said United States Court of Appeals for the District of Columbia Circuit be reversed by this Honorable Court, and that your petitioner may have such

other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE MASSACHUSETTS PROTECTIVE ASSOCIATION,

By: LOUIS M. DENIT,
THOMAS S. JACKSON,
RICHARD A. BISHOP,
Counsel for Petitioner.

BRANDENBURG & BRANDENBURG,
Of Counsel.

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were this 22nd day of June, 1955, mailed, postage prepaid, to Jo V. Morgan, Jr., Esq., Attorney for Respondent, 815 15th St., N. W., Washington, D. C.

LOUIS M. DENIT.